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Supreme Court, U. S.
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No. 98-583

In The

Supreme Court of the United States

October Term, 1998

CHAUNCEY JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Has Jackson failed to preserve his claim that race was a factor in his death sentence when no such claim was presented to or decided by the Virginia Supreme Court?

2. Should certiorari be granted to review Jackson's defaulted, state-law proportionality challenge?

3. In a case where there is not the slightest hint of juror partiality or bias, is there any compelling reason for this Court to decide whether the Constitution absolutely forbids the seating of an "illiterate" juror?

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STATEMENT OF THE CASE

On September 4, 1996, after a 10-day trial, a jury in the Circuit Court for the City of Norfolk convicted the petitioner, Chauncey Jacob Jackson, of capital murder, use of a firearm in commission of capital murder, a conspiracy to commit robbery, attempted robbery, use of a firearm while attempting robbery and of receiving stolen goods. The jury sentenced Jackson to death on the capital murder conviction finding that he represented a continuing serious threat to society. *See* Va. Code § 19.2-264.4.

After a separate sentencing hearing held May 20, 1997, the trial judge imposed sentence in accordance with the jury verdict. The judge additionally imposed sentences of ten years on the attempted robbery conviction, ten years on the conspiracy to commit robbery conviction, three years on the use of a firearm in commission of capital murder, and twenty years with all but two years suspended conditioned on twenty years of good behavior on the receiving stolen goods conviction.

The Supreme Court of Virginia affirmed Jackson's conviction and death sentence on April 17, 1998. *Jackson v. Commonwealth*, 255 Va. 625, 499 S.E.2d 538 (1998).

STATEMENT OF FACTS

The Virginia Supreme Court summarized the facts surrounding Jackson's offense as follows:

> The day after [Ronald] Bonney's murder, Jackson made a series of four oral statements to police investigators. The first statement was not

recorded, but the remaining three statements were recorded and transcribed. The following facts appear in one or more of those statements.

On the evening of August 31, 1994, Jackson was riding in a Jeep Cherokee driven by his friend, Rashad Vick. Vick stopped the vehicle when three other friends, standing near a so-called "dope house" on Vine Street, waved at them. One of the three friends suggested robbing a man, later identified as Ronald Gene Bonney, Jr., who was within sight, seated in the driver's seat of a Chevrolet Blazer parked nearby. Jackson and Vick agreed.

Accordingly, two of the group acted as "lookouts." Jackson procured a .25 caliber Beretta handgun from the Jeep. Accompanied by Calvin Outlaw and Angelo Artis, the other two members of the group, Jackson approached the parked vehicle. Outlaw placed his leg against the driver's door, next to Bonney, and later took the keys from the ignition switch when Bonney tried to drive away. Jackson, armed with the handgun, entered the front seat of the vehicle from the passenger's side, and, according to his last statement, Jackson told Bonney to "[g]ive it up." Bonney then "started patting his pockets and said, 'Give what up?'. . . . And then [Bonney] said, 'Shoot me, you little f – ker.' And then I cocked the gun, and then Angelo stepped up, and the gun jammed, and I tried to unjam it, and it shot." The gun fired three bullets which hit Bonney in the chest and arm and caused his death.

Jackson fled in the Jeep. He was arrested late that night and brought to police investigators for an interview at 7:20 a.m.

Jackson, 255 Va. at 632-633, 499 S.E.2d at 543.

REASONS FOR DENYING THE WRIT

I. JACKSON'S CLAIM THAT RACE WAS A FACTOR IN HIS DEATH SENTENCE HAS NOT BEEN PRESERVED FOR REVIEW.

Prior to the beginning of the penalty phase and out of the presence of the jury, Jackson moved to bar testimony on the issue of Jackson's future dangerousness by the Commonwealth's appointed mental health expert, Dr. Evan Nelson, unless and until Jackson offered evidence on the matter. The court and counsel then questioned Nelson as to whether he could deliver an opinion on Jackson's future dangerousness without relying on any statements made by Jackson. *See* Virginia Code § 19.2-264.3:1(G). During the course of this voir dire, Dr. Nelson first told the court and counsel that he could not deliver a definitive opinion on whether Jackson was "future dangerous." Nelson then acknowledged that he could base his testimony on matters other than Jackson's statements. Finally, Nelson also testified that historically there are several factors pertinent to an assessment of a person's propensity for future violent conduct, including "a defendant's race." The trial court ruled that Dr. Nelson could testify in the Commonwealth's penalty phase case-in-chief. Despite the trial court's ruling, the Commonwealth elected not to call Nelson. Jackson, however, called Dr. Nelson as his first mitigation witness. Dr. Nelson did not testify before the jury that "a defendant's race" was a factor in assessing a person's propensity for future dangerousness. Dr. Nelson also never opined that Jackson was a future danger because he was black. Nevertheless, Jackson asserts certiorari is warranted because

race supposedly "played a key role in the expert's opinion of future dangerousness." (Petition at 12).

A. Not raised below

Jackson never raised any race-based challenge to his death sentence in the Virginia Supreme Court and certainly did not attack Dr. Nelson's penalty phase testimony as violative of the Eighth Amendment and the Equal Protection Clause. Because the claim was not raised in the court below, certiorari is not warranted. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); Rule 14.1(g)(i).

B. Waiver

Jackson waived any claim of error based on Nelson's testimony by calling him as his own penalty-stage witness, ***after*** he had voir dired Dr. Nelson as to the basis for his testimony. This Court obviously should not grant certiorari to review an "error" which the petitioner invited.[1]

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[1] Jackson's assertion that Dr. Nelson was called by the defense only because the trial judge suggested such a procedure is categorically false. (Petition at 11, n.2). What the trial judge actually suggested was that, although Dr. Nelson was not prohibited from testifying in the Commonwealth's penalty phase case-in-chief, upon defense request, she would limit Nelson to a single appearance before the jury – in the Commonwealth's penalty phase rebuttal. Jackson elected not to follow that suggestion and called Dr. Nelson as his own witness.

C. No merit

Contrary to Jackson's overblown assertion, Dr. Nelson never "opined that Chauncey Jackson was a future risk to the community because he was black." (Petition at 16). Aside from the undisputed fact that Dr. Nelson did not opine that Jackson was future dangerous and specifically disavowed that such an opinion was even possible, all Dr. Nelson did was tell the trial judge, ***not*** the jury, that any defendant's race – whatever that race may be – was, along with a plethora of other considerations, historically pertinent in risk assessment. (Pet. App. 25a). In the context of race, this Court previously has declined "to assume that what is unexplained is invidious," *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987), and that proposition is equally applicable here.

It cannot be ignored, moreover, that when Dr. Nelson testified before the jury, he simply ***never*** opined to the jury that Jackson would be "future dangerous." Nor did Dr. Nelson state before the jury that "a defendant's race" was historically important in assessing risk. Rather, the bulk of Dr. Nelson's trial testimony was consumed by his diagnosis that Jackson suffered from an anti-social personality disorder. There simply is no showing that Jackson's death sentence was in any way based upon his race.

II. JACKSON'S PROPORTIONALITY CHALLENGE IS DEFAULTED AND RAISES NO COGNIZABLE FEDERAL ISSUE.

Jackson asserts that the proportionality review conducted by the Virginia Supreme Court on direct appeal deprived him of due process of law. Certiorari, however,

is not warranted because Jackson's proportionality claim was not raised in the state court, and because the claim does not raise a cognizable federal constitutional issue.

A. Default

In Virginia, the test for proportionality is "whether generally juries in [Virginia] impose the death sentence for comparable or similar crimes, considering both the crime and the defendant." *Chabrol v. Commonwealth*, 245 Va. 327, 335, 427 S.E.2d 374, 378 (1993). Jackson asserts that the proportionality review conducted by the Virginia Supreme Court is unconstitutional because it gives him no meaningful notice of exactly what the state court considers a "similar" case and no opportunity to be heard.

This constitutional challenge, however, is defaulted. Jackson could have challenged the constitutionality of Virginia Code § 17-110.1E during his direct appeal.[2] And, certainly, Jackson could have sought rehearing after the opinion of the Virginia Supreme Court came down and, at that time, argued that the cases relied upon by the state court in its proportionality analysis were dissimilar. *See* Virginia Supreme Court Rule 5:39 (allowing rehearing petition to alert court to errors of fact and law in its opinion). Jackson, however, did none of this. His claim,

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[2] Section 17-110.1E states that the Virginia Supreme Court "may accumulate the records of all capital felony cases tried within such period as the court may determine" and directs the court to "consider such records . . . as a guide in determining whether the [death] sentence . . . under review is excessive."

therefore, is not properly before this Court. *See Yee*, 503 U.S. at 533.

B. No federal issue

Proportionality review is not required under the United States Constitution. *Pulley v. Harris*, 465 U.S. 371 (1984). Jackson, therefore, has failed to state a federal claim and certiorari is improper. *See* U.S.Sup.Ct. Rules 10(b) and 10(c).

In accordance with Virginia law, moreover, the Virginia Supreme Court considered all the records of all capital murder cases previously reviewed by the Court and determined that Jackson's sentence was (1) not "imposed under the influence of passion, prejudice, or any other arbitrary factor," and (2) was not "excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for comparable or similar crimes." *Jackson*, 255 Va. at 650-652, 499 S.E.2d at 554-555. *See* Va. Code § 17-110.1C. The Virginia Supreme Court certainly was not required by the Constitution to do any more than this, and this Court should not grant certiorari to re-examine the Virginia Supreme Court's good-faith findings. *See Walton v. Arizona*, 497 U.S. 639, 656 (1990); *see also Barclay v. Florida*, 563 U.S. 939, 957 (1983) ("mere errors of state law are not the concern of this Court.").

III. JACKSON'S "ILLITERATE JUROR" CLAIM IS NOT WORTHY OF CERTIORARI.

Finally, Jackson asserts that there was federal constitutional error in his case because Mary Highter, who was

"somewhat illiterate," sat on his jury. Jackson recognizes that qualifications of jurors traditionally has been a matter committed to the sound discretion of the Legislature. (Petition at 27-28). He nonetheless asserts that this Court should grant certiorari and declare that the Constitution absolutely forbids the seating of illiterate persons on a jury in a state capital murder trial.

Petitioner presents no "compelling reason" to grant certiorari. "It rests with each state to prescribe qualifications as its deems proper for jurymen, taking care only that no discrimination . . . be made against any class of citizens solely because of their race." *In Re: Shibuya Jugiro*, 140 U.S. 291 (1891); *see also People v. Dunn*, 31 A.D. 139, 141 (N.Y. 1898) ("How [an impartial jury] shall be attained is left to the legislative judgment, subject only to certain fundamental principles. There is no express constitutional requirement as to the qualifications of the trial jury."); *United States v. Uribe*, 890 F.2d 554, 561 (1st Cir. 1989) (recognizing that 28 U.S.C. § 1865, which prohibits certain categories of persons from acting as jurors "does not implement a constitutional bar to jury service").

In Virginia, the General Assembly has determined that illiteracy does not automatically disqualify a person from serving as a juror. *See* Va. Code § 8.01-338 and § 8.01-2 (disqualifying from jury service those, among others, convicted of a felony, adjudicated mentally incompetent, those who are drug addicted or of "advanced age or impaired health"); *see also Jackson*, 255 Va. at 641, 499 S.E.2d at 548. Even in federal court, the statutory literacy requirement for jurors, *see* 28 U.S.C. § 1865(b), requires only "a minimum competency in the English language," *McDonough Power Equipment v. Greenwood*, 464 U.S. 548,

554 (1984), and there is no dispute that Highter was, at least, minimally competent in the English language.

In addition, Jackson's proposed rule – the per se exclusion of illiterate persons from jury service – "would be appropriate only if one could reasonably conclude that [illiterate persons] are always biased against one party or another." *United States v. Humphreys*, 982 F.2d 254, 264 (8th Cir. 1992) (rejecting the argument that the Sixth Amendment right to an impartial jury requires an absolute bar to felon-jurors), *cert. denied*, 510 U.S. 812 (1993). The touchstone of the Sixth Amendment right to an impartial jury, after all, is protection against juror bias. *See McDonough*, 464 U.S. at 554; *see also In Re: Oliver*, 333 U.S. 257 (1948) (the right to trial by jury guarantees accused a fair trial by a panel of impartial jurors). It is, in fact, ***unreasonable*** to conclude that illiterate persons are always biased against one party or another, especially in Jackson's case. Jackson never has even alleged, let alone established, that Highter was biased or partial. Rather, his whole claim rests on the faulty assumption that a juror who admittedly cannot read or write past a sixth grade level also cannot "comprehend and intelligently resolve the factual issues" inherent in a capital murder case and may have "depended on the prejudices and biases of other jurors" in arriving at a verdict.[3] (Petition at 28). To be clear, Jackson ***never*** has established that

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[3] Jackson voiced no objection to the impartiality of these "other jurors" after individual and unrestricted voir dire that last three full days. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984) ("It is fair to assume that [voir dire] usually identifies bias.").

Highter could not and did not adequately understand and independently weigh the evidence before her.

Highter's ability to perceive and weigh the evidence, moreover, was "best evaluated by the trial judge." *United States v. Dempsey*, 830 F.3d 1084, 1088 (10th Cir. 1987) (rejecting constitutional challenge to the seating of a deaf juror); *see also Patton*, 467 U.S. at 1039 (the trial judge is "best situated to determine competency to serve impartially"). Here, the trial judge questioned Highter and learned that she had a sixth grade education and had recently served on another jury without incident.

The trial judge, moreover, took steps to insure that Highter's apparent lack of education did not prejudice Jackson. All written evidence was read aloud to the jury. *See Louisiana v. Winzer*, 545 So.2d 1259, 1264 (La. App. 1989) ("where written evidence is read aloud into the record there is no prejudice shown to the defendant when a juror is illiterate."). Finally, the trial court insured that all instructions, including the verdict form, were slowly and methodically read to the jury. *Jackson*, 255 Va. at 641, 499 S.E.2d at 548. Certiorari should not be granted to review the trial judge's fact-specific determination that Highter, in accordance with Virginia law, was fit for jury service.

CONCLUSION

Jackson clearly has not presented any "special and important" reasons which should warrant certiorari review of his claims. Accordingly, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Respondent herein.

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